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Supreme Court of the United States.

October Term, 1929.

LUCKENBACH STEAMSHIP COMPANY,
a Corporation, Petitioner,
v.
THE UNITED STATES.
No. 49.

On Certiorari to the Court of Claims.

BRIEF FOR PETITIONER.

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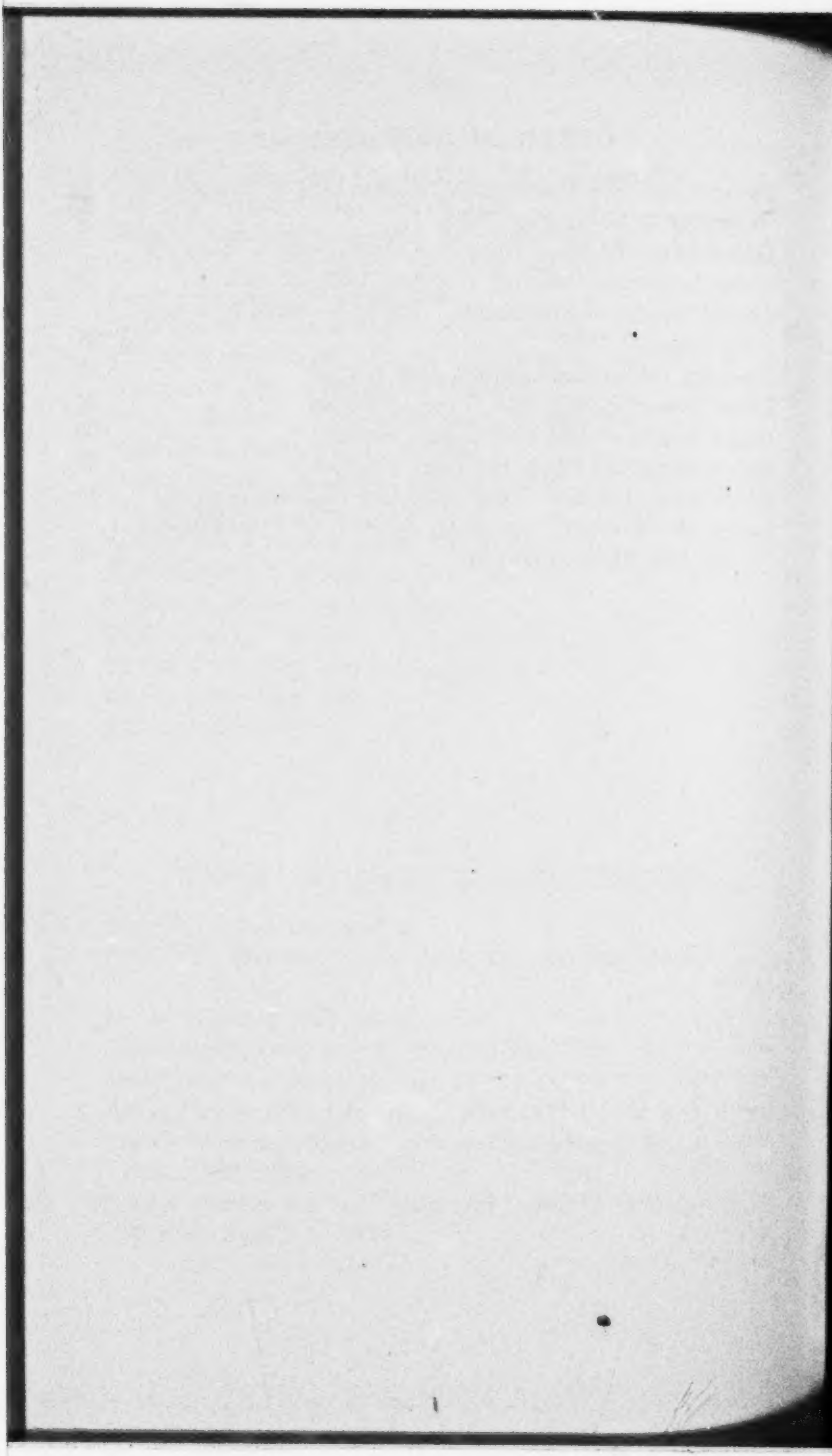
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BRIEF FOR PETITIONER.

I. Jurisdiction of This Court.

(1) The judgment to be reviewed was rendered by the Court of Claims, February 4, 1929 (R. 12, 26) and writ of certiorari was granted by this court April 29, 1929. The decision of the lower court is not yet reported (see opinion, R. 12).

(2) The claim advanced was as follows:

Plaintiff alleged that it transported the mails under orders of the Postmaster General between the United States and the ports of the Canal Zone from December, 1925, to June, 1926, and that the Postmaster General prepared and approved vouchers for such service on the basis of transportation of mails to foreign ports, as uniformly for a long time theretofore, and transmitted these to the General Accounting Office; that said office adopted certain arbitrary rates reducing the amounts of the vouchers and that plaintiff has received only said amounts. It claims the full amounts approved by the Postmaster General, a difference of $30,370.94 (R. 3–6).

The Court of Claims ruled that carrying mails to ports of the Canal Zone was not carrying mails to "foreign ports" and that plaintiff was entitled only to a reasonable compensation for the service rendered and that there was nothing to show this to be in excess of the amounts paid (R. 24–26).

(3) The jurisdiction of this Court is involved by reason of a grant of certiorari by this Court April 29, 1929.

II. Statement of the Case.

THE FACTS FOUND.

The Postmaster General had for a period of years and continuously to December 1, 1925, tendered to the petitioner, and the petitioner had transported, mails of the United States to the port of Colon, Republic of Panama, and to the Canal Zone. For the transportation of all such mails the petitioner was, on the approval of the Postmaster General, paid at the rates prescribed by the Postmaster General under Section 4009, Revised Statutes (*post*, p. 5), for the transportation by United States steamships of mails between the United States and a foreign port (Finding IV, R. 10).

From December 1, 1925, to June 30, 1926, there were delivered to United States vessels operated by the petitioner and transported by it large quantities of mails of the United States for delivery at ports at the Panama Canal and from ports at the Canal to ports in the United States (Finding V, R. 10).

The mails so carried, if paid at the rates prescribed by the Postmaster General for carrying mails on vessels of the United States between ports of the United States and foreign ports, would have entitled the petitioner to compensation amounting to $82,851.62. Vouchers aggregating said sum were approved by the Postmaster General and sent to the General Accounting Office for direct settlement. That office revised the accounts to make them aggregate $52,480.68 or $30,370.94 less than the amount approved by the Postmaster General. The petitioner has been paid only this amount (Finding VI, R. 10–11).

The action of the General Accounting Office in allowing and paying the lesser amount, and not the amount approved by the

Postmaster General for the seven-months' period, was the result of a conclusion by that office that the applicable rate for transportation of mails between ports of the United States and the Canal Zone was not that applying to the carrying of mails between ports of the United States and foreign ports but that applying between ports of the United States and its possessions. As mails of the latter class can only be carried under contract, it was held that the petitioner was entitled only to reasonable compensation, there being no contract. This compensation was determined by a comparison with compensation being paid others under contracts for the transportation of mails between the United States and its insular possessions (Finding VI, R. 11).

By the act of July 3, 1926 (44 Stat. 900, *post*, p. 6), Section 4009, Revised Statutes (U. S. Code, Title 39, Sec. 654) was amended so as to leave no question of the right of the Postmaster General to fix the compensation for transporting such mails at the rates previously fixed by him. After this, petitioner was paid as before December 1, 1925 (Finding VII, R. 11).

GROUNDS OF DECISION OF THE COURT OF CLAIMS.

1. The Court decided that the petitioner was not entitled to recover the difference between the amounts allowed by the Postmaster General and by the General Accounting Office on the following grounds (Opinion, R. 12–26):

(1) The Canal Zone is a part of the United States and its ports are not "foreign" within the meaning of the laws of the United States (R. 21, 24).

(2) The fact that officers of the United States had "for a long time considered and treated the Canal Zone as 'foreign'" "is not conclusive of its status" (R. 22).

(3) The fact that the Postmaster General "for a long time prior to December 1, 1925, had construed Section 4009, Revised Statutes, as giving him authority to pay for the trans-

portation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails" "between the United States and a foreign port," does not affect petitioner's rights because "an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage" (R. 24).

(4) In the absence of a contract entered into in accordance with the statutory requirements governing the carrying of domestic mails, "the only payment which may be authorized for the services is their reasonable value." In the absence of proof that the services were worth more than has been paid therefor, the plaintiff "can not recover the amount claimed in this case or any other sum" (R. 25–26).

(5) The act of July 3, 1926 (*post*, p. 6), amending Section 4009 of the Revised Statutes so as to allow the compensation denied by the General Accounting Office is not retroactive but "makes specific provision for the *casus omissus* in said Section 4009, Revised Statutes" (R. 25).

SUMMARY OF ARGUMENT.

1. The ports of Panama and the Canal Zone are "foreign ports" within the meaning and for the purposes of Section 4009, Revised Statutes (U. S. Code, Title 39, Sec. 654; printed, *post*, p. 5).

2. Whatever the merits of the question as an original construction, the contemporaneous and continued practical construction by the Postmaster General (as well as by other executive authorities, as will be shown hereafter) that ports of the Canal Zone are "foreign" within the meaning of this particular statute and for its purposes, followed by service and payment "for a period of years and continuously to December 1, 1925" (Finding IV, R. 10), should not be departed from to the unsettlement of rights acquired under this construction.

3. If the petitioner, having rendered the service without a written contract, is entitled to a reasonable compensation for the services, the amount fixed by the Postmaster General on the basis of the rates accepted by the parties for like service over a long period of years is *prima facie*, if not conclusive, evidence of reasonable compensation.

4. The act of July 3, 1926 (44 Stat. 900; *post*, p. 6), definitely establishing for the future the rate prevailing to December, 1925, and setting aside the rate fixed by the General Accounting Office decision not only made law for the future, but declared the concurrence of Congress in the construction by the Postmaster General of the existing Section 4009.

LAWS AND REGULATIONS.

The laws and regulations here brought into question are as follows:

Section 4009, Revised Statutes (U. S. Code, Title 39, Sec. 654):

"For transporting the mail between the United States and any foreign port, or between ports of the United States touching at a foreign port, the Postmaster General may allow as compensation, if by a United States steamship, any sum not exceeding the sea and United States inland postage except as otherwise provided by law; and if by a foreign steamship or by a sailing vessel, any sum not exceeding the sea postage, on the mail so transported."

Postal Laws and Regulations (Edition 1924, revised to October 1, 1925), Section 1405:

"Section 4009, Revised Statutes of the United States, having provided for the compensation to be allowed for the transportation of mails between the United States and any foreign port by a United States steamship or by a foreign steamship, as any sum not exeeeding the sea postage and United States inland postage in the first case, and any sum not exceeding the sea postage in the second case, it is accordingly declared that unless otherwise specially provided, the sums to be allowed for the transportation of United States mails on steamships

of United States registry shall be eighty (80) cents a pound for mails consisting of letters and postcards, and eight (8) cents a pound for mails consisting of other articles, including parcel post; and for transportation of foreign transit closed mails on steamships of United States registry, twenty-six and three-tenths (26.3) cents a pound (3 francs a kilogram) for mails consisting of letters and post cards, and three and five-tenths (3.5) cents a pound (40 centimes a kilogram) for mails consisting of other articles, including parcel post."

Act of July 3, 1926, Ch. 793, 44 Stat. 900:

"An Act to Amend Section 4009 of the Revised Statutes.

"*Be it enacted*, etc., That section 4009 of the Revised Statutes is amended to read as follows:

"Sec. 4009. (a) Except as provided in subdivision (b), for transportation of the mails, (1) between the United States or its Territories or possessions and any foreign country, (2) between the United States and its possessions or its naval or military forces abroad, or (3) between any such possession or naval or military forces and any other such possession or naval or military forces, the Postmaster General may allow, in the case of a vessel of the United States, compensation not in excess of the amount of the postage collected on the mail transported on such vessel, and in the case of a foreign vessel, compensation not in excess of the sea-transit rates prescribed from time to time by the Universal Postal Union Convention.

"(b) The provisions of subdivision (a) of this section shall not limit the compensation for transportation of mail which the Postmaster General may pay under contracts entered into in accordance with the provisions of Section 4007 of the Revised Statutes or Section 24 of the Merchant Marine Act, 1920.

"(c) In the case of mails transported between the United States or its Territories or possessions and any foreign country and in the case of mails transported between the United States and its possessions or its naval or military forces abroad, or between any such possession or naval or military forces and any other such possession or naval or military forces, payment for such transportation shall be made out of the appropriation for the transportation of foreign mails."

TREATY PROVISIONS.

"Convention between the United States and the Republic of Panama for the construction of a ship canal to connect the

waters of the Atlantic and Pacific oceans," ratified November 18, 1903 (33 Stat. Part 2, p. 2234), Article II:

"The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant."

Article III (p. 2235):

The Republic of Panama grants to the United States all the rights, power and authority within the zone * * * which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

Article XIV (p. 2238):

"As the price or compensation for the rights, powers and privileges granted in this convention by the Republic of Panama to the United States, the Government of the United States agrees to pay to the Republic of Panama the sum of ten million dollars ($10,000,000) in gold coin of the United States on the exchange of the ratification of this convention and also an annual payment during the life of this convention of two hundred and fifty thousand dollars ($250,000) in like gold coin, beginning nine years after the date aforesaid."

III. Argument.

(I) CANAL ZONE PORTS "FOREIGN" WITHIN THIS STATUTE.

Article II of the Panama Treaty, *supra*, grants "in perpetuity the use, occupation and control" of the Canal Zone for

designated purposes and Article III grants all the rights, power and authority within the Zone, "which the United States would possess and exercise *if it were* the sovereign of the territory." (Note the omission in the opinion below, R. 21, of the words here italicized.) Article XIV provides an annual payment, *quasi* rent. This is obviously very different in legal theory and in ultimate possibility, however it may be in present practice, from transferring all sovereign power to the United States. It leaves the Canal Zone in a different category from Hawaii, Porto Rico, and the Philippines, where sovereignty was ceded (Joint Resolution of July 7, 1898, 30 Stat. 750; treaty proclaimed, April 11, 1899, 30 Stat. 1755, 1756). The ports of the Canal Zone are not domestic ports of the United States in the same sense as those of Hawaii, Porto Rico and the Philippines, for the ultimate sovereignty of the latter ports is not foreign.

This difference is strongly accentuated in the series of statutes enumerated in the opinion below (R. 18–20) where special words were repeatedly used to include the Canal Zone within their provisions or within the term "United States" or "Territory of the United States" or "Territory."

The specific question whether the Canal Zone ports are "foreign ports" has not previously been before this court, but it has been discussed by a number of authorities.

In a learned article by Lester H. Woolsey, appearing in Vol. 20, pp. 117–124, of the American Journal of International Law, it is said, pp. 120–121:

"From this summary of the provisions of the treaty of 1903, it will be observed that all of the articles of that treaty, except possibly Article III, relate in some obvious manner to the construction, maintenance, operation, sanitation and protection of the Panama Canal. Therefore, the history of the relation of the United States to the Isthmus, from 1846 to the present time, has centered around this great undertaking, and this fact should, according to Vattel, give a clue to the meaning of Article III of the Canal Treaty. This reasoning leads to the deduction that the rights of sovereignty of the United States under Article III are limited to those necessary or convenient for carrying out the project which was the

object and purpose of the negotiators of the treaty. From this point of view the doing of anything which does not further the construction, maintenance, operation, sanitation and protection of the canal would be beyond the powers given to the United States in the Canal Zone. In accordance with this view the United States has turned back to Panama certain lands not necessary for the canal enterprise.

"It may be observed in the second place from Article III itself that it in terms does not transfer full and complete sovereignty to the United States. There remains a scintilla of sovereignty—a reversionary sovereignty still in the Republic of Panama. On this point Mr. Taft, then Secretary of War, stated before the Committee on Interoceanic Canals, April 18, 1906, that:

> "'It [Article III] is peculiar in not conferring sovereignty directly upon the United States, but giving to the United States the powers which it would have if it were sovereign. This gives rise to the obvious implication that a mere titular sovereignty is reserved in the Panamanian Government. Now, I agree that to the Anglo-Saxon mind a titular sovereignty is like what Governor Allen, of Ohio, once characterized as a "barren ideality," but to the Spanish or Latin mind poetic and sentimental, enjoying the intellectual refinements, and dwelling much on names and forms, it is by no means unimportant. Therefore, when the question of the form of stamp was to be determined, I had not the slightest hesitation in yielding to the view that we should adopt the system which for a time General Davis had himself adopted before he got United States stamps, of merely purchasing the Panamanian stamps and crossing them with the words "Canal Zone."
>
> "'The truth is that while we have all the attributes of sovereignty necessary in the construction, maintenance, and protection of the canal, the very form in which these attributes are conferred in the treaty seems to preserve the titular sovereignty over the Canal Zone in the Republic of Panama, and as we have conceded to us complete judicial and police power and control over the zone and the two ports at the end of the canal, I can see no reason for creating a resentment on the part of the people of the Isthmus by quarreling over that which is dear to them but which to us is of no real moment whatever.'"

The author continues (p. 121):

"In the third place, while Article III on the one hand seems to grant to the United States the 'exercise' of 'all the rights, power and authority' within the Canal Zone which the United States would possess and exercise if it were the sovereign to the entire exclusion of the exercise of such rights by Panama, other articles on the other hand appear to restrict the exercise of a general right of sovereignty by the United States."

Again, pp. 121–122:

"In the first place, Article II is not an absolute cession, conveyance or transfer of territory. If this had been the intention, no doubt a simple form of cession of territory and dominion would have been employed, as was done in the case of the Louisiana Purchase (Treaty with France, 1803, 8 Stat. 200), and the Alaska Purchase (Treaty with Russia, 1867, 15 Stat. 539), with a provision added as to the allegiance of the inhabitants. Article II is a grant to the United States of the 'use, occupation and control' for a specific purpose and does not purport to convey absolute title. The United States could not sell or transfer the zone or any part of it, because she has not complete title in fee."

Mr. Woolsey goes on to say (p. 123) that it doubtless was not the intention of either party that the United States should hold and administer the Canal Zone as an independent colony or possession of the United States.

In a recent book, "The Isthmian Highway," by Hugh Gordon Miller, this statement is made (p. 221):

"The chief legal advisers of the United States have recognized our peculiar position in Panama. In 1909 Attorney General Bonaparte said the Canal Zone was not 'a territory' of the United States, 'but a place held by us for a very special and peculiar purpose.' Later in the same year Acting Attorney General Wade Ellis said:

" 'The Canal Zone is not one of the possessions of the United States within the meaning of the Tariff Act of 1909, but rather a place subject to the use, occupation and control of the United States for the purpose of constructing and maintaining a ship canal connecting the waters of the Atlantic and Pacific Oceans.' "

It is thus clear that from the very date of the Treaty with Panama, the anomalous status of the Canal Zone with national control but ultimate foreign sovereignty has continued to be the subject of discussion and interpretation and of uncertainty in its application to varying conditions.

(2) LONG CONTINUED CONSTRUCTION AND USAGE.

It is therefore not strange that the Attorney General and heads of various departments and bureaus have from time to time been called upon to decide whether the Canal Zone and its ports were "foreign" within the meaning of certain laws. They have uniformly held them to be so.

The Attorney General.

The opinion of Attorney General Bonaparte, referred to above in the quotation from the book "The Isthmian Highway," is apparently not among the published opinions. That of Acting Attorney General Wade H. Ellis is reported in 27 Op. Atty. Gen. 594. The latter opinion answered negatively the question whether the Canal Zone was "a possession" of the United States within the meaning of the Tariff Act of August 5, 1909 (36 Stat. 11), providing for duties on goods "from any foreign country into the United States or into any of its possessions" (with exceptions not here necessary to enumerate). If not a "possession" for tariff purposes, it is difficult to see why the Canal Zone should be classed as such for mail carrying purposes.

Attorney General Wickersham was later called on to construe the provisions of "An Act to provide for ocean mail service between the United States and foreign ports and to promote commerce," approved March 3, 1891, 26 Stat. 830, the particular question being "whether the ports of Colon and Panama will, after the Canal is constructed, remain foreign ports." He answered this question as follows (29 Op. Atty. Gen. 194, 196):

"It appears from the papers transmitted by you that it will be more convenient for the vessels contracting for this mail service to use principally the Government docks, which are being constructed at Cristobal on the Atlantic side and Balboa on the Pacific side; and the question arises whether by using these docks, which are in close proximity to but outside the limits of the cities of Colon and Panama and within the Canal Zone, the vessels would be carrying mails to foreign ports. It is stated in this connection that docking the large vessels at the cities of Colon and Panama would result in serious loss of time, and that the actual call at these places could be obviated by the use of a tender to meet the vessels upon entering the 'harbor adjacent to these ports' to receive and deliver the mail in Colon and Panama, the vessels then proceeding to the Government docks at Cristobal and Balboa.

"It has been held that the purpose of the act of March 3, 1891, is 'to promote the carriage of the ocean mails in ships of American register, and thereby to promote ocean commerce in American bottoms,' and that this statute 'designed to promote foreign commerce, is entitled to a liberal construction with a view to carrying out the purpose of its enactment.' (20 Op. 98, 101).

"In my opinion, the service proposed is in substantial compliance with the letter and spirit of the statute, as being between 'ports of the United States' and 'ports of foreign countries.' The word 'port' is not limited in its application to the city which bears the same name, but has been defined as including the entire harbor, within its enclosures and projections of land, where ships take refuge and seek shelter. (*United States* v. *Morel*, 26 Fed. Cases, 1310; *DeLonguemere* v. *New York Fire Insurance Company*, 10 Johns. (N. Y.) 120, 124; *Mobile Marine Dock Co.* v. *McMillan*, 27 Ala. 77, 99; *Martin* v. *Hilton*, 9 Metc. 371, 378.) Construing the word 'port' as synonymous with 'harbor' the vessels unquestionably would be carrying the mails to a foreign port if they entered the harbor, since the treaty reserves to Panama not only the cities of Panama and Colon, but also 'the harbors adjacent to said cities.' In any event, I think that carrying the mails upon such vessels within such close proximity to said cities that they might safely be landed in a small boat would be a substantial compliance with the terms of the act."

A later decision in the same volume (29 Op. 269) holds:

"A vessel loading at the Colon Wharf of the Panama Railroad Co., and subsequently entering a port of the United States should be regarded as coming from a 'foreign port or place' within the meaning of Section 36 of the tariff act of August 5, 1909 (36 Stat. 111), and the Republic of Panama, for the purposes under consideration, should be treated as sovereign over such wharf."

DEPARTMENT OF LABOR.

The Department of Labor, putting a construction on the immigration laws, says (Dept. of Labor, Bureau of Immigration, Immigration Laws and Rules of March 1, 1927, foot p. 112):

"Ports of the Panama Canal Zone shall be deemed to be foreign ports, and any vessel entering and clearing from any such port shall be subject to all the immigration laws, rules and regulations applicable to vessels arriving in the United States from any foreign port or place."

TREASURY DEPARTMENT.

The Internal Revenue Office in answering an inquiry by the Panama Railroad as to the status of its employees says:

"Treasury Department
Washington.

July 7, 1926.

Panama Rail Road Company,
24 State Street,
New York, N. Y.
Att. Mr. V. M. Newton, Acting Third Vice Pres.

Reference is made to your letter dated June 4, 1926, in which you inquire as to whether the officers of your vessels who perform personal services for more than six months during the year beyond and without the territorial limits of the United States are entitled to exemption from taxation on their earned income from sources without the United States.

"In reply you are advised that the officers employed on your vessels who are American citizens and who are bona fide non-residents of the United States (that is, are away from the United States), for more than six months during the taxable year, are exempt from Federal income tax with respect to their compensation for services rendered without the terri-

torial limits of the United States. The term 'United States,' as used in a geographical sense, in addition to continental United States, includes the Territories of Alaska and Hawaii.

Respectfully,

D. H. BLAIR,
Commissioner."

COMPTROLLER GENERAL.

In 5 Comp. Gen. 647, he says (p. 648):

"It appears from the foregoing that Congress has generally treated the Canal Zone as 'foreign' to the United States, any exception to that general rule being for specific purposes only."

CONCURRENT EXECUTIVE CONSTRUCTION.

Thus three departments—Justice, Labor and Treasury—beside the Post Office Department and the General Accounting Office treat the Canal Zone when described in United States Statutes as coming under the head of "foreign" territory. It would be difficult to marshal a greater array of departmental authority in support of any legal construction.

EFFECT OF EXECUTIVE CONSTRUCTION.

A long continued line of decisions of the Supreme Court has settled that a course of departmental construction will be regarded as controlling, especially where to depart therefrom at a later date would infringe private rights or violate contractual or quasi-contractual obligations of the United States.

In *United States* v. *Moore*, 95 U. S. 760, the court said (p. 763):

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 210; *United States* v. *The State Bank of North Carolina*, 6 Pet. 29; *United States* v. *McDaniel*, 7 id. 1. The officers concerned are usually

able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In *United States* v. *Johnston*, 124 U. S. 236, the court said (pp. 252, 253):

"What was said in *United States* v. *Jones*, 18 How. 92, 96, may be repeated here, as applicable to accounts which have been finally acted upon by a head of department, invested with authority in the premises. There the question was as to the right of accounting officers to review the action of the Secretary of the Navy in approving certain disbursements made by an officer of the Navy in conformity with the orders of the Secretary. This court said: 'The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments.'

* * * * * * * * *

"In view of the foregoing facts the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous. *Edward* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Moore*, 95 U. S. 760; *Hahn* v. *United States*, 107 U. S. 402; *United States* v. *Philbrick*, 120 U. S. 52, 59."

In *Schell's Executors* v. *Fauché*, 138 U. S. 562, the court said (p. 572):

"It is an acknowledged principle of law that if rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public such rights ought not to be impaired or disturbed by a different construction, and if, notwithstanding Treasury Regulation Number 384, requiring protests to be special in each case, a practice has grown up in the different ports of entry of receiving prospective protests, the annulment of such practice might entail serious consequences upon importers who had acted upon the faith of its validity. As early as 1803 it was held by this court in *Stuart* v. *Laird*, 1 Cranch. 299, 309, that a practical construction of the Constitution that the justices of the Supreme Court

had a right to sit as circuit judges, although not appointed as such, was not open to objection. 'It is sufficient to observe,' says the court, 'that practice and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest and ought not now be disturbed.' In all cases of ambiguity the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

The case of *Alabama Great Southern Railroad*, 142 U. S. 615, affirming 25 C. Cls. 30, is particularly strong on this point. This court said (p. 621):

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government."

It was said in the same case by the Court of Claims, opinion by Judge Nott, 25 C. Cls. 45–46:

"Every man is bound to know the law and the true interpretation thereof, but where the responsible officers of the

Government give a construction to a statute, upon the faith of which a contractor renders a service and receives his pay, can the Government subsequently say that the payment was illegal, and open the transaction, and recover back the money? In the case of disbursing officers it has been held that where payments were made in pursuance of the rulings of accounting officers, the Government as between the disbursing officer and itself, is estopped from setting up that the payments were illegal (*Hartson's* case, 21 C. Cls. 451). Is there any difference in principle between the case of a disbursing officer who paid out money on the faith of the Treasury Department's ruling and of a carrier who carried the mails on the faith of the Postmaster General's construction of a statute? Ordinarily the construction given to a statute by a Department is favorable to the Government; that is to say, favorable to itself and unfavorable to the other party, who is seeking to draw upon its limited appropriations. Yet, where there is a foundation of ambiguity to stand upon, the courts have not hesitated to say that the contemporaneous construction by executive officers called upon to interpret a statute, and appointed to carry it into effect, is entitled to great respect, and ought not to be overruled without cogent reasons, although a different construction might be given to the statute if the question were altogether new. (*Brown* v. *The United States*, 113 U. S. 568.)"

The most recent statement is found in *United States* v. *Minnesota*, 270 U. S. 181, where the court said (p. 205):

"The Act of 1860 was construed as we here construe it by Secretary Delano in 1874, 1 Copp's P. L. L. 475, and by Secretary Schurz in 1877, 2 Id. 1081; and their construction was adopted and applied by their successors up to the time of this suit and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction. *United States* v. *Burlington and Missouri River R. R. Co.*, 98 U. S. 334, 341; *Schell's Executors* v. *Fauché*, 138 U. S. 562, 572; *Louisiana* v. *Garfield*, 211 U. S. 70, 76; *United States* v. *Hammers*, 221 U. S. 220, 228; *Logan* v. *Davis*, 233 U. S. 613, 627."

ACTION OF PARTIES.

But not only have officers of the government uniformly construed the treaty provisions as leaving the Canal Zone "foreign" for certain purposes, including mail transportation, but, in reliance upon advice of the Attorney General in analogous cases, the Postmaster General over a period of years has dealt with the petitioner and the petitioner has dealt with him on that basis, the petitioner carrying mails and being paid on such basis. It would seem that the ruling of the Attorney General was ample authority for the course pursued and, as held in *Smith* v. *Jackson*, 246 U. S. 388, 389, "should have put the subject to rest."

WILSON v. SHAW, 204 U. S. 24.

The court below (R. 23) stresses the above case as decisive here. The question decided was entirely different. Nothing is more dangerous than to adopt general expressions used in one case as decisive of the issue in another.

(3) REASONABLE COMPENSATION.

But even if it be concluded that the ports of the Canal Zone are not "foreign" ports within the meaning of this statute as determined by the Postmaster General, the question remains, what is the proper domestic rate?

The court below says (R. 25–26):

"Prior to July 3, 1926, the compensation for transporting the mail between the United States and its possessions was required to be fixed by contractual agreement. In the absence of such a contract entered into in accordance with statutory requirements, or any law specifically fixing the compensation for such service, it is evident that the only payment which may be authorized for the services is their reasonable value. The plaintiff has not seen fit to offer any evidence to prove that the amount allowed and paid by the General Accounting Office for the services is not reasonable in comparison with the compensation fixed in contracts for a similar service. In the absence of proof that the services were worth more than has been paid therefor the plaintiff can not recover the amount claimed in this case or any other sum."

The payment of reasonable compensation for services rendered without a written contract is in accordance with the rule laid down by this Court in *Clark* v. *United States*, 95 U. S. 539, where it is said (p. 543):

"Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents, which, as shown by the findings, was the period of eight days. This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose. Neither party thought fit to adduce any other."

Two Determinations Here.

There are two determinations of reasonable compensation in this case:

(a) The Postmaster General determined it on the basis of the rates paid for transportation of mails to foreign ports.

(b) The Comptroller General determined it "by comparison with compensation being paid under contracts for the transportation of mails between the United States and its insular possessions" (Finding VI, R. 11).

The court below ignored the Postmaster General's determination and accepted the Comptroller General's.

Postmaster General's Determination Preferable.

The Postmaster General's should have been accepted for the following reasons:

(1) Plaintiff carried mails not only to the ports of the Canal Zone but also "to the Port of Colon, Republic of Panama" (Finding IV, R. 10). For the latter service it received beyond doubt the rate fixed for "foreign ports" and this, as shown by Attorney General Wickersham's opinion, cited, *ante*, p. 12, when delivery was made at the Government Dock at Colon, the very same dock at which mails for the Canal Zone were

delivered. The Postmaster General, exercising the discretion conferred by Rev. Stat., Sec. 4009, *ante*, p. 5, allowed the same rate for the mails to the Canal Zone as paid for the mails to Colon in Panama. It was reasonable to do this; it would have been unreasonable to do otherwise. To hold now any other as a reasonable rate is to declare the rates to Panama unreasonable.

(2) The vouchers showing the higher rate were not only approved by the Postmaster General; they were prepared in his office (Finding VI, R. 11). These vouchers as so approved constitute the highest evidence of the value of the service. The Postmaster General is charged by law with all the duties touching the transportation of the mails of the United States. By Revised Statutes, Section 396, Par. 9th, "It shall be the duty of the Postmaster General" "to superintend the general business of the department and execute all laws relative to the postal service." He may, and frequently does, order the performance of service without any formal contract. He also approves such service after it has been rendered and fixes the compensation for the same. When he does so, it is to be presumed that the amount fixed by him for the value of the service is correct, far more so than can be the amount calculated by the Comptroller General.

In *Salomon* v. *United States*, 19 Wall. 17, this court held (p. 20):

"* * * when the quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster."

Much more strongly does this rule apply where it is a head of a department certifying to the value of services rendered at his request without any formal contract.

The rule is elementary in the jurisprudence of the Court of Claims and was thus stated by Chief Justice Richardson, who had been Secretary of the Treasury, in *McCann* v. *United States*, 18 C. Cls. 445, 447:

"A voucher given by an officer of the Government, in the regular and ordinary course of his business, for services performed or articles purchased by his order for the public service within the scope of his authority and the line of his duty unimpeached, is *prima facie* evidence of indebtedness on the part of the United States as therein stated."

Under this very Section 4009, the action of the Postmaster General in fixing the rate was held conclusive in *Pacific Mail Steamship Co.* v. *United States*, 28 C. Cls. 1.

This is a case for the special application of the language of this Court in *United States* v. *Jones*, 18 How. 92, 99, quoted with approval in *United States* v. *Johnston*, 124 U. S. 236, 252, *ante*, p. 15:

"The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments."

(3) Petitioner furnished services without other agreement than that implied from a course of dealing over several years. The service was invited and rendered on the assumption that it would be performed on the terms theretofore applying. The previously existing rates, in the absence of anything to the contrary beyond the opinion of an accounting officer, are reasonable rates for the particular service here involved and should be so accepted here. In *Bowers Hydraulic Dredging Co.* v. *United States*, 211 U. S. 176, a construction claimed by the contractor as the proper one to be placed on a contract was held inadmissible because a previous contract had received a contrary construction. In *Ceballos* v. *United States*, 214 U. S. 47, the decision was in favor of the contractor on the ground that a previous contract had been construed as contended by the contractor.

(4) LATER ACT DECLARATORY OF LAW.

Hardly had the decision on this question been rendered by the Comptroller General than Congress corrected it by legislation.

The act of July 3, 1926 (44 Stat. 900), "An Act to Amend Section 4009 of the Revised Statutes," is quoted in full, *ante*, p. 6. It removed all doubt of the power of the Postmaster General to pay for transportation of the mails to the ports of the Canal Zone at the same rates as to "foreign ports." Payments were thereafter so made (Finding VII, R. 11).

Plaintiff contends that this act is to be construed as a disapproval of the ruling of the Comptroller General, not only making law for future time but also supporting the past action of the Postmaster General under the law already in existence. It is easy to say (opinion, R. 25) that "statutes are not to be given a retroactive effect unless the legislative purpose so to do plainly appears," but declaratory acts are not uncommon and acts will be so construed where good reason appears. Such a construction was given in *Clark* v. *Bailey*, 5 Fed. Cases, 856, Federal Case #2814, 12 Blatchf. 156, in an internal revenue case, the court saying:

"It is not an insignificant circumstance, that, by the act of June 6, 1872, 17 Stat. 256, Congress expressly enacted, that the words 'capital employed' in said 110th section 'shall not include moneys borrowed or received from day to day, in the usual course of business, from any person not a partner of, or interested in, the said bank, association, or firm.' It is possible to say that this statute changed the law. But it seems to me that the language is better adapted to declare the construction and meaning of the law. It would have been easy and appropriate, if that alone was the design, to say that hereafter money so borrowed shall not be liable to the tax. My opinion, that the terms employed did not include money so borrowed, renders it unnecessary to do more than say that this further enactment is not inconsistent with that view, and may well have been passed in order to remove any doubt theretofore entertained on the subject."

This court, affirming the judgment, more briefly said, *Baily* v. *Clark*, 21 Wall. 284, 288:

"This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising it would undoubtedly have so provided in terms."

In *McNamara* v. *United States*, 28 C. Cls, 416, 421–422, a declaratory effect was placed upon a similar act giving another reading to a prior statute:

"By the act of 1891 Congress declared that Section 1285 of the Revised Statutes should read as provided in said act. This form of legislation—the giving a different reading to a prior act—is peculiar to Congress, so far as we have observed. It is reasonable to presume, from such phraseology, that the intention was that the latter act should be construed as having effect from the date of the prior act, as though such prior act had been originally so framed, * * *.

"So far as such legislation, thus construed, affects the liability of the United States, and does not interfere with the vested rights of individuals and is not penal, it is within the constitutional power of Congress and it is not obnoxious to the objections to retroactive laws, especially when such laws are remedial."

This statute is of the kind described in *In re McKenzie*, 142 Fed. 383, C. C. A., 8th Cir., where it was said (p. 388):

"The true purpose and the designed effect of statutes, declaratory of the common or existing law and preservatory of the rights vested thereunder, is to dispel doubt and to make plain the fact that such laws and rights shall remain undisturbed."

That the act in question is a declaratory act, intended to disapprove the construction of the Comptroller General, is shown by the reports of the Committees of both Houses of Congress on the bill which became the act of July 3, 1926. Reference to these with a view to determining the scope of statutes passed on the strength of such reports, is approved in *Binns* v. *United*

States, 194 U. S. 486. See also *Duplex Company* v. *Deering*, 254 U. S. 443, 474.

The report of the House Committee on Post Offices and Post Roads thus refers to the Comptroller's decision (House Report #1305, 69th Cong., 1st Sess., *italics ours*):

"*The Comptroller General of the United States has recently ruled* that under the present law all service for carrying mail to and from our island possessions and our military forces at foreign ports shall be provided as domestic mail service subject to the requirements applying thereto and must all be paid for out of the appropriations for inland transportation by steamboat or other power-boat routes.

"The Post Office Department has heavy mail between New York and Porto Rico, between Porto Rico and the Virgin Islands, and between San Francisco and Hawaii under contract as domestic mail service and paid for such transportation out of the appropriations for inland transportation by steamboat or other powerboat routes. Other mails, however, have heretofore been carried in the same manner as foreign mails between New York and the Marine Corps at Port au Prince, Haiti, between New York and the Canal Zone, between San Francisco and Guam, from the United States war vessels in Asiatic waters to San Francisco, and other miscellaneous sailings between New York and the Virgin Islands, and this particular service has been paid for along with foreign mails out of the appropriations for transportation of foreign mails. Generally on these sailings the steamship carries both mails for the island possession or military force in connection with mails for foreign countries."

The report concludes (*italics ours*):

"There are two rates on foreign mail; one is to American vessels and one to foreign vessels. American vessels are paid 80 cents a pound for first-class mail and for other matter 8 cents a pound. Foreign vessels are paid 26.3 cents a pound for first-class mail and 3½ cents a pound for other mail. The Post Office Department tries to give the mail to American vessels in accordance with the instructions of Congress.

"*If the comptroller's decision went into effect under the present law* it would be necessary to advertise the mail to our insular possessions and war vessels and be given to the lowest bidder, etc., and make a formal contract. Under the foreign mail

arrangement the Post Office Department just offers it to any boat that is ready to go out at any time the mail is ready to go and such boats carry it at the pound rate without any contract at all. It would also cause two classes of mail and a domestic rate for each.

"The domestic service department is strictly limited to a contract while in the foreign service Congress authorizes the Postmaster General to contract for not to exceed a certain rate to American vessels and at a certain rate to foreign vessels, and that is all the contract there is and the vessels just go ahead and carry the mail."

The same statements are repeated in Senate Report #1096, 69th Cong. 1st Sess. On the strength of these reports the bill became a law.

In a still later report made in 1928 the purpose of the act of July 3, 1926, is thus referred to (House Report #1788, 70th Cong., 1st Sess.; also Annual Report Postmaster General for the fiscal year ending June 30, 1927, pp. 46–47; *italics ours*):

"Prior to the act of July 3, 1926, it had been customary for many years to pay American registry ships 80 cents per pound for carrying letters and post cards to foreign countries and 8 cents for other articles, including parcel post. The act referred to provides that the Postmaster General may allow to vessels of United States registry compensation not in excess of the amount of postage collected on the mails transported on such vessels. *The purpose of the act was not to reduce the rates paid to American ships but to clarify the law.* However, the General Accounting Office holds that we can not continue to pay the 80 and 8 cent rates unless it is shown that the postage collected from mails dispatched on each trip of a ship is not less than the rates fixed. In order that the great and useless amount of work involved in this ascertainment may be obviated, it is recommended that the law be changed so as to authorize payment to American ships at not exceeding the rates referred to above, which have been in effect for at least 50 years."

These reports show that the act was due to the recent ruling of the Comptroller General that mails "heretofore carried in the same manner as foreign mails between," among other places, New York and the Canal Zone, "shall be provided as

domestic mail service subject to the requirements applying thereto." The report says: "If the Comptroller's decision went into effect under the present law,"—plainly implying that the Comptroller General's decision should not go into effect at all, if the proposed law passed. Finally there is the distinct declaration that "the purpose of the act was not to reduce the rates paid to American ships but to clarify the law."

All such services as herein claimed for were paid at the foreign mails rate for many years prior to December, 1925, and at the same rate since the act of July 3, 1926. A disallowance of this claim would be a decision that an exception is to be made from December, 1925, to June, 1926, to a rule earlier and later in force. The act of July 3, 1926, was a legislative clarification of the law not only for the future but also for the past.

IV. CONCLUSION.

Summarizing the arguments above made, it is submitted:

1. The ports of the Canal Zone are "foreign" within the meaning and for the purposes of the mail transportation statute, Rev. Stat. Sec. 4009 (*ante*, pp. 7–10).

2. If there is doubt about this, such doubt should be solved by the wide-spread, uniform contemporaneous and long-continued executive construction (*ante*, pp. 11–17).

3. If the ports of the Canal Zone are not "foreign," to the extent stated above, then petitioner is entitled to a reasonable compensation for service rendered. The best evidence of this is the finding of the Postmaster General in accordance with the rates paid for like service over prior years (*ante*, pp. 19–21).

4. The act of July 3, 1926, expresses the Congressional intent that payment for carrying the mails to ports of the Canal Zone should be at the rates for carrying the mails to foreign ports (*ante*, pp. 22–25).

When the Canal Zone came under United States jurisdiction,

the Postmaster General decided, under a statute many years in existence, supported therein by uniform contemporaneous executive decisions, that the ports of the Canal Zone were foreign ports for mail transportation purposes and fixed the pay accordingly. Plaintiff carried the mails continuously on this basis until the Comptroller General held after December, 1925, that the Postmaster General had been continuously in error, refused plaintiff for services already performed the mail pay which it had been continuously receiving and fixed a lower rate. Congress at its next session restored the former rate of pay but in the interim plaintiff received the lower rate fixed by the Comptroller General rather than the Postmaster General. However ingeniously this reduction may be argued as a matter of strict law, the common sense of justice is revolted at it. It is believed that this brief has pointed out a path of reconciliation between law and justice.

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Supreme Court of the United States.

October Term, 1929.

LUCKENBACH STEAMSHIP COMPANY, a Corporation, *Petitioner*,
v.
THE UNITED STATES.

No. 49.

On Certiorari to the Court of Claims.

66 C. Cls. 679.

ASSIGNMENTS OF ERROR.

While the brief for petitioner already filed is thought to show with sufficient certainty the errors relied on under the headings "Grounds of Decision of the Court of Claims" (pp. 3, 4) and "Summary of Argument" (pp. 4, 5), yet in order to comply fully with the requirements of the rules in that regard the petitioner now formally assigns the following errors in the judgment of the Court of Claims:

1. That said court held that the Canal Zone is a part of the United States and that its ports are not "foreign" within the meaning of the laws of the United States, whereas said court should have held that the ports of Panama and the Canal Zone are "foreign ports" within the meaning and for the purposes of Section 4009, Revised Statutes, U. S. Code, Title 39, Sec. 654.

(Brief for petitioner, p. 3, par. 1; p. 4, par. 1.)

2. That said court held that the fact that officers of the United States had "for a long time considered and treated the Canal Zone as 'foreign'" is not conclusive of its status,

whereas said court should have held that such long continued action was conclusive.

(Brief for petitioner, p. 3, par. 2; p. 4, par. 2.)

3. That said court held that the fact that the Postmaster General "for a long time prior to December 1, 1925, had construed Section 4009, Revised Statutes, as giving him authority to pay for the transportation of mails between the United States and the Canal Zone the same compensation provided for in said statute for the transportation of mails" "between the United States and a foreign port," does not affect petitioner's rights because "an unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage," whereas said court should have held that such long continued course of dealing between the United States and the petitioner and other carriers of the mails was conclusive as to service subsequently rendered on the faith of that construction.

(Brief for petitioner, p. 3, par. 3; p. 4, par. 2.)

4. That said court held that in the absence of a contract entered into in accordance with the statutory requirements governing the carrying of domestic mails, "the only payment which may be authorized for the services is their reasonable worth" and that in the absence of proof that the services were worth more than has been paid therefor, the plaintiff "can not recover the amount claimed in this case or any other sum," whereas said court should have held that the petitioner having rendered the services without a written contract is entitled to a reasonable compensation for the services and that the amount fixed by the Postmaster General on the basis of the rates accepted by the parties for like services over a long period of years is *prima facie*, if not conclusive evidence, of reasonable compensation.

(Brief for petitioner, p. 4, par. 4; p. 5, par. 3.)

5. That said court held that the act of July 3, 1926, Chapter 793, 44 Stat. 900, to amend Section 4009 of the Revised

Statutes is not retroactive, but only fixes rates for the future, whereas said court should have held that said act in setting aside the rates fixed by the General Accounting Office decision not only made law for the future, but declared the concurrence of Congress in the construction by the Postmaster General of the existing Section 4009.

(Brief for petitioner, p. 4, par. 5; p. 5, par. 4.)

6. That said court decided as a conclusion of law that the petitioner is not entitled to recover and dismissed its petition, whereas said court should have held that the petitioner was entitled to recover and should have entered judgment in his favor for the amount shown to be due for the services as fixed by the Postmaster General, amounting to $30,370.94.

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